IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of PETER THOMPSON, Bankrupt. R. D. SIMPSON, Trustee of the Estate of PETER THOMPSON, Bankrupt, *Petitioner,* —vs.— L. H. MACOMBER, Receiver of the PETER THOMPSON COMPANY, a Corporation, *Respondent.*	No. 3433

ON MOTION TO DISMISS PETITION FOR REVIEW.

REPLY BRIEF

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REPLY BRIEF

In his motion to dismiss appellant's petition for review under Section 24 (b) counsel takes as his premise that a claim of over $500.00 has been rejected, and hence the remedy must be by appeal.

Assuming that the method by appeal is the exclusive method of bringing before the Appellate Court a review of the allowance or rejection of a

claim of $500.00 or over—which, however, we do not concede—it is manifest that the allowance or rejection of the "claim" or "debt" in the instant case is not the allowance or rejection of a claim or debt as is contemplated under Section 25 (a).

A brief review of the facts discloses that the question at issue arises out of a "proceeding" in bankruptcy. Just one year, lacking a few days, after Thompson had been adjudicated a bankrupt, a receiver was appointed for a corporation in which Thompson was a stockholder, and this receiver, under the assumption that Thompson had turned over insufficient property in payment of his stock subscription, undertook to bring an action in the state court, under a show cause order, to subject the assets in the hands of the bankrupt's trustee to the payment of this alleged balance.

The referee's order (pp. 129-130) discloses,

> "I FIND that the claim of said L. H. Macomber as receiver is in proper form and is entitled to be filed as a claim in said estate, to which ruling the trustee through his attorney, W. W. Keyes, duly excepts, and his exception is allowed. I further
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> "FIND, however, that the creditors represented by the said L. H. Cacomber as receiver, have participated in the estate of the said Peter Thompson Company, and have received through said source a greater percentage upon their indebtedness than the other creditors whose claims have been filed and allowed in this estate, and being of the opinion heretofore expressed as shown by the files and records here-

> in, that the creditors of Peter Thompson, and those creditors represented by L. H. Macomber as receiver, should share equally and ratably, and the said creditors represented by said L. H. Cacomber as receiver having refused to pay back or to tender the several amounts paid to them under such receivership proceedings, the same are not therefore entitled to participate in the funds of this estate."

Again in his certificate of review on page 70, in explaining the above order, he says: "The present order bars claimant from sharing in this fund (meaning the fund derived from the sale of the merchandise assets of bankrupt, W. W. K.). But it leaves him free to share in any other fund or estate that may be discovered."

On review to the District Judge, the latter put the claim in the same classification with other general claims of the estate. The trustee, while asserting at all times that the alleged liability of Thompson on his stock subscription was such as would not be discharged through bankruptcy, nevertheless accepted the ruling of the referee, and never appealed therefrom. It follows, therefore, that the question to be reviewed is the same question certified to the District Judge by the referee, viz., "Whether or not the claim of L. H. Macomber, receiver, should be *allowed . . . to participate in the funds now in the hands of the trustees*" (p. 71).

The last order made by the referee (pp. 129-30) expressly holds that the claim "is in proper form and is entitled to be filed as a claim in said estate."

Both the referee and the District Judge have allowed the claim, the former denying participation in certain funds realized from the merchandise assets, the latter holding that the claim should be given the same rank as other unsecured claims. It is not a question of allowance or rejection of a claim or debt. It is a question of rank of a claim that has arisen in the course of the bankruptcy proceedings, whereby an effort is being made to subject certain assets, or the proceeds therefrom, to the satisfaction of the alleged claim, brought into being nearly a year after the adjudication of the bankrupt. No question of fact is involved. We assert that the proper way to submit a question of this character is by a petition for review. In brief we are asking this Court "to superintend and revise in matter of law the proceedings" of a court of bankruptcy.

It is true that the trustee at all times insisted that the claim should be denied participation in any fund of the estate, regardless of the source of the fund. The Honorable Referee, however, did allow the claim, but held that until the creditors represented by the trustee had received a percentage on their debts equal to that received by the creditors represented by the said Macomber as receiver, they should not be allowed to participate in the fund in the hands of the trustee (pp. 129-30). The Referee's certificate on review (pp. 66-71) states very clearly the position taken by him.

> *In Euclid Nat. Bank vs. Union Trust & Deposit Co.*, 149 Fed. 975,

a very similar question arose to the one under consideration. An order was made denying a claimant participation in the individual assets of the bankrupt until the individual creditors had been paid. The Court says: "A preliminary question is raised which it is necessary first to dispose of, namely, the appellees moved to dismiss the petition on the ground that the relief sought could only be secured by appeal pursuant to Sections 24 and 25 (a) of the bankruptcy law and not on a petition for review. It is true that the last named section, paragraph 3, contemplates that appeals should be taken in case of the allowance or rejection of a debt or claim in excess of $500.00 and that that is the appropriate remedy, and not a petition for review; but we think, upon a careful perusal of the two sections in question, it will be apparent that the action complained of was not such a rejection of the debt claimed as is contemplated in the act regarding appeals. Neither the referee nor the lower court rejected the debt of the petitioners but denied to the holders of the debts the right of participation in the individual assets of the bankrupt until the individual creditors had been first paid. The petitioners would share to the full extent of their debts in any distribution of the individual estate after the extinguishment of the individual debts, had there been sufficient assets. The motion to dismiss should therefore be denied."

Judge Lurton, in

In re Mueller, 135 Fed. 711, 714,

says:

> "If, however, the debt or claim is not disputed, and the only question sought to be revised is one of rank, or priority of the claim by reason of its character, or some lien in its favor against the property of the bankrupts, it has been held by the Circuit Court of Appeals for the Seventh Circuit that, so far as the order or decree depended upon a question of law, it could be revised upon a petition for review." Citing
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> *In re Rouse vs. Hazord Co.*, 91 Fed. 96;
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> *In re Richards*, 96 Fed. 935;
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> *Courier Journal Co. vs. Brewing Co.*, 101 Fed. 699.

In *Burleigh vs. Foreman*, 125 Fed. 217, 219 (First Circuit), the Court says:

> "So with reference to this provision of the bankruptcy act of 1898, on which appellee relies, it is not unreasonable to hold that a dissatisfied litigant may appeal as to both the law and facts, or may, where a question of law is concerned, take the less expensive and the more summary manner of raising that alone by a revisory petition. Certainly, no detriment could could come therefrom, because, in the latter case, the party aggrieved waives all questions of fact which is for the advantage of the winning party in the court below."

Petitions for review and appeals are fully discussed in this case, and we especially call the Court's attention to this decision.

See, also,

Hutting Sash Co. vs. Stitt, 218 Fed. 1;

Snow vs. Dalton, 203 Fed. 843.

We urge most respectfully, at the same time emphatically, that the question now before this Court is not one of allowance or rejection of a claim, but one of classification. Again quoting the final order of the referee:

> "I find that the claim of the said L. H. Macomber as receiver is in proper form and is entitled to be filed as a claim in said estate, to which ruling the trustee, through his attorney, W. W. Keyes, duly excepts," etc.

And, as already pointed out, the referee was very careful to point out in his certificate on review in referring to his final order:

> "The present order bars claimant from sharing in this fund. But it leaves him free to share in any other fund, or estate, that may be discovered."

Counsel cites *First National Bank vs. State Bank*, 131 Fed. 430, and quotes therefrom. An examination of this case discloses that one question only was considered by the court, viz., whether the trial court had jurisdiction to entertain a petition for rehearing after an appeal had been perfected.

ON MOTION TO DISMISS THE APPEAL.

We think opposing counsel rather begs the question. He assumes that this case comes under one of the especially enumerated conditions prescribed in Section 25 (a) for an appeal in ten days.

Decisions of trial courts may be reviewed by the Circuit Court of Appeals in one of three ways, viz.:

(1) By petition for review. (2) Appeals under the general appellate jurisdiction as conferred by Section 24 (a). (3) By appeal upon the allowance or rejection of a claim of $500.00 or over. Proceedings under (1) and (2) must be taken within six months, and under (3) within ten days.

Our contention is that the matter in controversy between the representatives of the two classes of creditors, that is, the trustee in bankruptcy on one hand, and the receiver of the corporation on the other, if not reviewable by petition under Section 24 (b) is distinctly a controversy contemplated under Section 24 (a) and appealable under the general jurisdiction conferred thereunder. If, however, we should be wrong as to the foregoing contentions, the appeal was seasonably perfected even under Section 25 (a), as we shall presently show.

The trustee's attorney finds ready sympathy in the language used in

Thomas vs. Woods, 173 Fed. 585, 587.

> "At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. *In re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Coder vs. Arts*, 213 U. S. 223, 232, 29 Sup. Ct. 436, 54 L. Ed. —. The classi-

fication of matters in bankruptcy as 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a 'bankruptcy proceeding' is brought under review in an appellate court, it presents a 'controversy,' and of necessity this is also a 'controversy arising in a bankruptcy proceeding.' The phrases, therefore, upon which this classification is based are tautological. Again, the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544; U. S. Comp. Stat. 1901, p. 3418) itself uses the phrase 'proceedings in bankruptcy' in a double sense. Section 23 provides as follows:

'The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees,' etc.

'Here the term "proceedings in bankruptcy" embraces "controversies arising in bankruptcy proceedings," as well as "bankruptcy proceedings proper," and sets them both over against plenary suits between trustees and adverse claimants (instituted by bill or complaint, with subpoena or summons), touching rights or property not in the custody of the court. In Section 24b, however, the terms "proceedings in bankruptcy" as construed by the courts, has been given a narrower meaning, and has been set over against "controversies arising in bankrupty proceedings," as used in Section 24a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those "contro-

> versies arising in bankruptcy proceedings" on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy. The confusion that has resulted from the attempt of the courts to apply this classification to actual litigation affords strong support for the decisions of this court that the methods of review provided by the bankruptcy act are not mutually exclusive but cumulative. *In re McKenzie*, 142 Fed. 383, 73 C. C. A. 483; *Dodge vs. Nortin*, 133 Fed. 363,66 C. C. A. 425; *In re Holmes*, 142 Fed. 391, 73 C. C. A. 49'."

It will be remembered that the present controversy arises out of a mongrel judgment obtained by the receiver in the state court. Under an order entitled "Order appointing time for hearing petition for call and assessment" (p. 28) he secured from the state court a purported decree, among other things directing the receiver "to file a claim for said amount in the bankruptcy proceedings," etc., and "to take any and all steps and proceedings that may be necessary looking to the collection of said claim" (p. 9). In passing it may be noted that finding 3 (p. 5) of the state court says: "That the debts of the Peter Thompson Co., a corporation, at the time of the appointment of the receiver herein were *approximately* $7,500, and said sum is now a true, just, and valid indebtedness," etc. The next finding, 4 (p. 5), says the expenses of administration "*will not exceed* $1,000." How the "expenses of administration," even though determined, could possibly be a proper claim to be paid by the creditors of the bankrupt, is open to wonderment.

Judge Lurton in *In re Mueller*, 135 Fed. 713, says:

"Cases which are appealable are of two classes: 1. There is the broad appellate jurisdiction conferred by Section 6 of the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549), by appeal or writ of error, from the final decisions of the District Court 'in all cases other than those provided for in the preceding section of this act.' That the decree or judgment is one arising in a controversy relating to the settlement of the bankrupt's estate does not make it any the less appealable or reviewable by writ of error. Upon the contrary, Section 24a provides as follows:

'The Supreme Court of the United States, the Circuit Courts of Appeals of the United States, and the Supreme Courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. U. S. Comp. St. 1901, p. 3431.'

"That neither the fifth nor sixth section of the act of 1891 (26 Stat. 827, 828; U. S. Comp. St. 1901, pp. 549, 550) was changed by the bankrupt act was expressly decided in *Bardes vs. Hawarden Bank*, 175 U. S. 526, 20 Sup. Ct. 196, 44 L. Ed. 262, and *Elliott vs. Toeppner*, 187 U. S. 327, 334, 23 Sup. Ct. 133, 47 L. Ed. 200. By 'controversies arising in bankruptcy proceedings' is meant those independent or plenary suits which concern the bankrupt's estate, and arise by intervention or otherwise between the trustee representing the bankrupt's

estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.

"2. The time within which a writ of error may be taken out or an appeal prayed from a judgment or decree of the District Court in 'a controversy arising in bankruptcy,' such as is referred to in Section 24a, is the time prescribed by the eleventh section of the judiciary act of 1891 (26 Stat. 829; U. S. Comp. St. 1901, p. 552), namely, six months."

If the instant controversy is one "arising in bankruptcy proceedings" then it should be reviewed under the authority of 24 (a). Just what is a "controversy arising in bankruptcy proceedings" is not unmixed with doubt, at least to the writer. Judge Lurton says "those independent or plenary suits which concern the bankrupt's estate, and arise by intervention, or otherwise, between the trustee representing the bankrupt's estate, and claimants asserting some right or interest adverse to the bankrupt or his general creditors."

If Peter Thompson had not been in bankruptcy, clearly under the authority of *Chamberlain vs. Piercy*, 82 Wash. 157, 143 Pac. 977, and *Beddow vs. Huston*, 65 Wash. 585, 118 Pac. 752, it would have been necessary to sue in a proper tribunal to collect his stock subscription, unless, of course, he voluntarily paid the same. Certainly no judgment could have been taken against him on a show cause order. The receiver has "short cut," so to speak, and now claims that he has never undertaken to

assert a right or interest adverse to the bankrupt or his general creditors, but that his claim is like any other debt in existence at the time of filing the petition in bankruptcy. In brief, if it was necessary to sue Thompson, he having a right to his defenses, it is none the less a right which his trustee should have, and when the receiver submits himself to the forum of the bankruptcy court, instead of suing in a regular way in the state court, as he might have had a right to do, we say that a controversy is presented arising in bankruptcy proceedings.

Even if the "judgment" procured by the receiver is valid in every respect, and even if the state court finds that Peter Thompson did not pay in full for his stock subscription, it would follow, we think, that when an attempt is made to subject the assets in the hands of the trustee to the satisfaction of that judgment, there is presented most decidedly a question that is adverse to the rights of the creditors represented by the trustee. The receiver can not save himself by calling it a "claim," and hence provable as other general claims, when, if, as a matter of fact, some form of litigation yet remained to determine its status. Instead of suing Thompson or the trustee in bankruptcy upon their refusal to pay, he has submitted the matter to the jurisdiction of the bankruptcy court, and we urge most strongly that a controversy arising in bankruptcy is presented, and hence appealable under the broad appellate jurisdiction. The present controversy is not un-

like that in *In re Doran* (6th Circuit), 18 A. B. R. 760, 154 Fed. 468:

> "The petitioner, Moorman, brings this matter here by petition for review and also by appeal, being doubtful, apparently, of the proper remedy. He filed a petition in the bankruptcy proceedings praying for the allowance of a claim for a debt of the bankrupt and for priority by reason of a mortgage given by the bankrupt securing it. Upon a hearing before the referee, his claim for the debt was allowed, but the priority claimed was disallowed. He applied for a review of the order disallowing priority to the district judge, who affirmed the order of the referee. This left nothing in controversy but the question of the priority of lien which the petitioner claimed under his mortgage. If the decision had been against his claim of debt, he could have brought the case here by appeal under Section 25a of the Bankruptcy Act, and its right to priority could have been settled if the debt was established, because the lien was a mere incident of the debt. This was so held by this court in *Cunningham vs. Ins. Bank*, 4 Am. B. R. 192, 103 Fed. 932. But the claim for the debt having been allowed, only the incident remained, and that of itself was not sufficient to support an appeal under Section 25a. The order was a decree in a controversy in a bankruptcy proceeding and not an order in a bankruptcy proceeding proper and, therefore, is not reviewable under Section 24b. But we think the order of the District Court complained of may be reviewed under the authority of Section 24a, which authorizes an appeal to this court, or a writ of error in controversies of this sort, in accordance with our decision. *In re First National Bank of Canton*, 14 Am. B. R. 180, 135 Fed. 62. Such an appeal is one which is in conformity with appeals in other than bankruptcy cases."

In a very late case,

Matter of Dressler Producing Corp., 44 A. B. R. 457 (Second Circuit December, 1919),

the court says:

"The petitioner seeks to have this cause reviewed both by a petition to revise and by an appeal. Evidently they have been doubtful as to their remedy. We have considered the cause as coming to us pursuant to a petition to revise rather than an appeal. Summary proceedings are reviewable only by a petition to revise. In *re Goldstein* (C. C. A., 7th Cir.), 32 Am. B. R. 802, 216 Fed. 887; *Gibbons vs. Goldsmith* (C. C. A., 9th Cir.), 35 Am. B. R. 40, 222 Fed. 826. Where the court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant itself, the action may be reviewed by a petition to revise. *Mueller vs. Nugent*, 184 U. S. 1, 7 Am. B. R. 224; *Shea vs. Lewis* (C. C. A., 8th Cir.), 30 Am. B. R. 436, 206 Fed. 877; *In re Gill* (C. C. A., 8th Cir.), 26 Am. B. R. 883, 190 Fed. 726; *In re Vanoscope Co.* (C. C. A., 2d Cir.), 36 Am. B. R. 778, 233 Fed. 54.

"There is a clear distinction between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings'. Bankruptcy proceedings, broadly speaking, cover questions between the alleged bankrupt and include the matters of administration generally, such as appointments of receivers and trustees, allowances of claims and matters to be disposed of summarily. All of these matters occur in the settlement of the estate. *In re Friend* (C. C. A., 7th Cir.), 13 Am. B. R. 595, 134 Fed. 778. *The determining factor or the important consideration for ascertaining to which class the particular application belongs, is to determine the ob-*

ject and character of the proceedings sought to be reviewed. If it is a controversy arising in bankruptcy proceedings, the Circuit Court of Appeals exercise their jurisdiction as in other cases, under Section 24a. If the controversy pertains to proceedings in bankruptcy relative to the adjudication and the subsequent steps in bankruptcy, it is one which may be revised in matters of law upon notice and a petition by the aggrieved party.

"Petitions to revise bring up questions of law only; appeals both of law and of fact. *Elliot vs. Toeppner*, 187 U. S. 327, 9 Am. B. R. 50.

"If the question arises in an independent suit to determine the claim necessary for the settlement of the estate, or if it arise in one of the cases specified in Section 25a, review may be had by appeal, but if the question pertains to and arises in a bankruptcy proceeding and does not fall within either of the cases specified in Section 25a, review may be had by petition to revise in matter of law."

The matter of collecting stock subscription by a receiver of an insolvent corporation in the State of Washington is not open to doubt or dispute. Briefly, it is incumbent upon the receiver to have a preliminary hearing, at which time the receiver's application is heard, and also the nature and validity of the debts of the corporation, and then the court *may not enter a judgment* but an order "directing proceedings against the stockholders". (*Chamberlain vs. Piercy, Grady vs. Graham, Beddow vs. Huston, supra.*)

The *character* of the proceedings sought to be reviewed by the court is fully discussed in the trus-

tee's brief, pp. 4 to 10, inclusive, and we respectfully direct the Court's attention to the same.

Under this state of facts, the question is presented as to whether or not the representative of the corporate creditors has brought about a "controversy arising in the bankruptcy proceedings".

As pointed out heretofore, we are not now concerned with the question of a rejection or allowance of a claim of $500.00 and over. The referee has allowed the receiver's claim, but refused to allow it participation in the funds then in the hands of the trustee. The District Judge says it should participate in that fund. Whether the practical effect of the referee's order may or may not result in the receiver getting anything on his alleged claim out of this estate is not a question for consideration.

Again quoting a portion of the referee's order "being of the opinion heretofore expressed as shown by the files and records herein that the creditors of Peter Thompson and those represented by L. H. Macomber as receiver should share equally and ratably", etc., it is quite apparent that as to any other fund that may come into the hands of the trustee, the receiver shall share in the same along with the bankrupt creditors, that is, each class of creditors shall receive the same percentage on their debt, but the creditors represented by the receiver having already received a large percentage, and having refused to account for or surrender the

same, are barred from this particular fund pending their willingness to comply with the referee's order.

SHOULD THE APPEAL HAVE BEEN TAKEN WITHIN TEN DAYS?

We think the District Judge was well within his rights in setting aside the order of Sept. 30, 1919.

Trustee's counsel confesses willingly that out of abundance of precaution he should have, perhaps, ascertained when the order, which had been prepared by opposing counsel, was presented to the Court for signature, and the date the same was signed if approved. On the other hand, he urges most strongly, that it was none the less the duty of opposing counsel, or someone, to notify him that the order had been signed, and the date thereof.

We believe it is a matter of which this Court will take judicial notice, viz., that the District Court is not in continuous session in Tacoma. Furthermore, that the Judge of this division is, for a major portion of his time, holding court elsewhere. Hence it is necessary, oftentimes, to wait his return, or to forward by mail papers intended for his signature. We mention this only to show that it does not necessarily follow that an order will be immediately signed by the Judge when being mailed to the clerk for presentation, and hence there should be an obligation on the part of someone—either counsel or the clerk—to notify the opposing counsel of the date of the actual signing of the order, or the instrument

in question. Counsel for appellee, in his letter to the clerk enclosing his proposed order, requests: "Kindly advise me when the order is signed." It can hardly be said that it would have been any infringement on the rules of propriety as followed by the profession and bar generally, for opposing counsel to have notified counsel for the trustee that his order had been signed on Sept. 30th, etc.—especially since the time for appeal, assuming the same must have been perfected within ten days—was very short. Instead, however, counsel waited until October 13th before so notifying him.

Immediately upon hearing that the order proposed by appellee had been actually signed, the trustee filed a petition for rehearing. This petition was filed in the best of good faith and is absolutely meritorious.

As pointed out in the petition for rehearing (pp. 73-75) at the time of the hearing and argument before the District Judge, the latter held that the recital of facts in the Findings made by the Superior Court for King County to the effect that the trustee of Peter Thompson, bankrupt, had appeared in that proceeding was binding and conclusive on him. While the trustee, on the other hand, maintained most strenuously that he had never filed any appearance in the King County proceedings, whereupon opposing counsel, counsel for appellee herein, made the statement that the trustee's attorney had entered into a stipulation concerning the proposed

hearing in the King County court, and counsel for the trustee not being aware at the time the statement was made in open court that any such stipulation, or any stipulation, had been made or entered thereto, caused to be prepared by the Clerk of the Superior Court for King County a certified transcript of the files of the proceedings in which the receiver had procured the order or "judgment" against the funds then in the hands of the trustee. An examination of these files, which are a part of the record in this case, discloses that there was filed with the clerk of the King County Court, Seattle, Washington, a proposed stipulation which had been prepared with a view of securing an extension of a few days for the hearing on the proposed call and assessment. The trustee herein had been notified by mail that a hearing would be held in the Superior Court of King County at a given date, but being unable to be present on that date, either in person or by counsel, the trustee, through his counsel, prepared the proposed stipulation. Opposing counsel, who being the same as now appears in this court, was unwilling to sign said stipulation looking to an extension of time. Instead of returning the same to the trustee's counsel, he filed the instrument without the knowledge of the trustee or his counsel in the County Clerk's office for King County, Washington, and even paid the appearance fee thereon. In passing, we think it is quite evident that appellee's counsel was not satisfied with the manner in which he sought to bring the trustee into the state court

proceedings, namely, by mailed notice, and evidently thought that by filing the instrument in question, with the signature of the attorney for the trustee appended thereto, the latter would then be forever estopped from questioning the subsequent proceedings.

The certified files, which are a part of the record in this Court, show absolutely the kind of appearance (?) made by the trustee. The foregoing was the basis for rehearing and was argued and presented in the utmost good faith.

The petition for rehearing (which had been filed on the 14th of October, 1919) came on in due course and without objection on the part of counsel to the consideration thereof by the Court, and was submitted to the Court for decision and the fact that in the judgment of the Court no sufficient reasons were advanced to overturn his previous conclusions, or that he arrived at the same conclusion as previously, does not affect the validity of the order made.

The statement of opposing counsel that the act of the District Court in vacating the order of September 30th was to circumvent the Statute and to extend or revive a lost right of appeal is without foundation. *The Court granted a rehearing.* It is true that the Court arrived at the same conclusion which he had arrived at on previous hearing. It would seem that if counsel for the receiver intended to question the jurisdiction of the Court to consider the petition because not filed within ten days after

the entry of the order complained of, he should have raised the question by motion to strike the petition, or some other appropriate procedure. We do not believe that this Court will question the act of the District Judge in setting aside the order of September 30th and in again considering the trustee's objection as raised by the petition for rehearing in question. We think that the receiver, Macomber, by not having moved against a consideration of the petition for rehearing, is now estopped to question the act of the District Court in considering the same. At all events we believe that the only question for consideration is whether or not the District Court had jurisdiction to grant a rehearing and set aside the order on a petition filed more than ten days after the entry of the original order. The District Judge specifically finds in his order of November 24th (p. 133), as follows:

> "On October 13, 1919, the said W. W. Keyes was reminded that said order had been signed and entered by this Court on September 30, 1919, and this was the first actual knowledge had by the trustee or his attorney of the signing and filing thereof. Whereupon the trustee promptly filed the petition to rehear and to vacate, above referred to.
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> "The Court further finds that an appeal had at all times been contemplated by the trustee, to the Circuit Court of Appeals, in the event of an adverse decision by this Court, and that the delay in taking such an appeal within ten days after September 30, 1919, was not caused by the culpable neglect of the trustee, etc. . . .

"It is further ordered that the petition for rehearing be denied."

Opposing counsel at the top of page 9 of his brief states that the entry of the order of November 24th was "simply to circumvent the Statute, and to extend or revive the lost right of appeal." The fact that the Court granted the rehearing but arrived at the same conclusion that he had arrived at previously would, of necessity, compel the Court to enter the same order, namely, an order permitting the referee to participate in the fund in question. In other words, it can not be urged that because the District Judge arrived at the same conclusion as formerly, his act in making the order of November 24th was "simply to circumvent the Statute". If the petition for rehearing had been a "pretense", manifestly the Court would have refused to consider the same, and, furthermore, counsel had ample opportunity to object to a reconsideration of the claim on its merits as raised by the petition to rehear. This identical question has been before the courts, and it is generally conceded that the trial court is well within its jurisdiction in granting a rehearing even after the ten-day period has expired.

Counsel directs the Court's attention to *West vs. McLoughlin*, 162 Fed. 124, 20 A. B. R. 654. This case very much sustains the position of the District Court in granting a rehearing and setting aside the former order. We quote therefrom, as follows:

"The appellant proved and filed a claim for $5,000 for money had and received from him by the bankrupt. Objection to the claim was made by the trustee, and upon the testimony heard before the referee the latter disallowed it. On the 23d day of July, 1907, the District Court affirmed the order of the referee, and the judge, having at once left upon a vacation trip, was not, for over ten days, within reach of appellant's counsel, who desired to take steps for an appeal. No reason is disclosed by the record for not taking other available steps for that purpose; but on the 13th day of September, 1907, appellant filed a petition for a rehearing. The Court granted that relief, and after further discussion in a second opinion the district judge again and somewhat more at length stated his reasons for adhering to the judgment affirming the referee's order disallowing the claim. The order of the District Court again affirming the referee was entered on the 30th of October, 1907.

"The appellee has moved for the dismissal of the appeal. Section 25a of the bankruptcy act Act July 1, 1888, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432) provides (quotation of Statute omitted):

'One purpose which runs through the act is to require the prompt and expeditious winding up of estates, and the provision just copied was intended to promote that end. Notwithstanding some judicial expressions which possibly favor it, we can not accept as accurate or sustainable the contention that it would not be an abuse of the discretion of the court to set aside an order disallowing a claim for the sole purpose of extending the time for taking an appeal. We conceive that such a course would practically nullify the wise provision of the

Statute, and go beyond the bounds of a proper discretion; but we do not doubt that an order disallowing a claim, as well as other orders, is within the control of the court making it, and that the court may, in the exercise of a sound judicial discretion, set it aside, *even after the expiration of ten days.* This court, in the case of *In re Ives,* 113 Fed. 911, 51 C. C. A. 541, so decided upon a kindred proposition and fully stated the reasons for the rule. The records show that it was not a mere purpose to evade Section 25a that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only re-examined the questions involved, but more elaborately stated his views thereon. The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him. Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied'."

Counsel also cites *In re Wright,* 96 Fed. 820, 3 A. B. R. 154. This was a decision of the District Court of Massachusetts, and we quote the entire opinion, which is as follows:

"In this matter the court rendered a decision July 21, 1899, and the decree was entered on that day. The questions involved were important, the sum of money involved was considerable, and an appeal by the unsuccessful party was expected. Owing to a series of mishaps, which it is not necessary to rehearse, no appeal was taken by the trustee within the ten days mentioned in Section 25a of the bank-

ruptcy act. The court is satisfied that the delay was not caused by the culpable neglect of the trustee or his counsel. As soon as might be after the expiration of the ten days, the trustee filed in this court a petition for a rehearing, avovedly with the object of regaining by means of a rehearing the right of appeal which he had lost by the expiration of time. The court is satisfied with its original decision upon the merits of the case, and will not grant a rehearing in order to give those merits further consideration. To grant a rehearing upon the pretense of reconsidering the merits of the case, but really to revive the petitioner's right of appal, would be the employment of an unworthy fiction. The record should show the true purpose for which the rehearing was sought and granted. On the other hand, if it is within the power of this court to revive the petition's right of appeal by granting a rehearing expressly for that purpose, the court is disposed to take appropriate action to that end. The question presented, therefore, is this: Can the district court grant a motion for a rehearing filed after the expiration of ten days from the date of the decree involved? The question just put seems to be decided in favor of the court's jurisdiction in *Stickney vs. Wilt*, 23 Wall, 150, 164. In that case a party filed his petition in the circuit court for the review of a decree of the district court in bankruptcy. The circuit court decided in his favor, and the other party appealed to the Supreme Court, which decided that the proper remedy for an erroneous judgment of the district court concerning the matter in question was by appeal to the circuit court, and not by petition for review and revision. The supreme court therefore remanded the case to the circuit court with directions to dismiss the petition for review. The decision of the supreme court was ren-

dered after the time allowed for an appeal from the district court to the circuit court; but, in delivering the opinion of the Supreme Court, Mr. Justice Clifford said:

"'Unable to refer the appellee to any legal remedy as matter of right, under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the district court will grant a review of the decree rendered in that court if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the circuit court.'

"From this remark it seems to follow that the supreme court considered that the district court would be justified in granting a review of its own decree for the purpose of allowing that decree to be appealed from, although the application for review was presented after the time for appeal had expired. The trustee's petition for a rehearing, which may be treated as a petition for review, is granted as of this date. On October 10, 1899, let a decree be entered allowing proof of the claim of the county of Worcester as a debt entitled to priority."

Subsequently the case reached the Circuit Court of Appeals and entitled *In re Worcester County*, and reported in 102 Fed. 808. The position of the District Judge was sustained as shown by the following quotation taken from the opinion:

"The underlying questions involved in these three cases are the right of the county of Worcester to prove a claim in bankruptcy, and to have priority for the claim if allowed, all under

the bankruptcy act of July 1, 1898, c. 541 (30 Stat. 544). The referee allowed the claim, but refused it priority. On appeal to the district court, that court, on the 21st day of July, 1899, entered an order as follows: 'It is hereby ordered and decreed that the debt may be proved by the county any is entitled to priority, and that the decree of the referee be modified accordingly.' Derby, the trustee in bankruptcy, desired to appeal, but he failed to do so within the ten days limited by the statute for appeals. Thereupon, on the 30th day of August, 1899, he filed a petition for rehearing. It is apparent that the purpose was to revive the right of appeal. The court treated the petition for the rehearing as a petition for a review, and on the 4th day of October, 1899, granted it, and on the 10th entered an order as follows: 'It is hereby ordered and decreed that the proof of the county of Worcester be allowed as a debt entitled to priority.' It will be noticed that the order thus entered departed literally from that of the 21st day of July, but we assume that the second was intended to be substantially the same as the earlier one, and to have effect both to allow the proof and to establish its priority. Derby, as trustee, thereupon appealed, and his appeal is the subject-matter of *Derby, Trustee, vs. County of Worcester*. The grounds of his appeal are two: First, that the district court erred in allowing the proof; and, second, that it erred in allowing it as a debt entitled to priority.

"The order of July 21st was entered during the term of the district court which commenced on the fourth Tuesday of June, 1899, and the petition for rehearing was filed at the same term. The order granting the rehearing, however, was entered at the term commencing on the second Tuesday of September, 1899. Inas-

much as the petition was filed during the June term, and was not stricken out, but was heard and its merits acted on at the September term, it must be accepted that the petition was filed at the June term with the consent of the court, and that the court thus held its control over the proceeding. In *Andres vs. Timm*, 12 C. C. A. 77, 64 Fed. 149, decided by this Court, the facts were as follows: A petition, which we held to be, in substance, a petition for a rehearing, was seasonably filed in an equity cause at the October term of the circuit court for the district of Massachusetts. There was nothing in the case to show that the petition was brought to the attention of that court, until the succeeding May term, when it heard it on its merits and denied it. We held that the proceeding was effective, and that the time for appeal did not begin to run until the petition was denied. This decision was cited, without disapproval, in *Kingman & Co. v. Western Mfg. Co.*, 170 U. S. 675, 679, 18 Sup. Ct. 786, 42 L. Ed. 1192. We relied on *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, 34 L. Ed. 986, an examination of which will show that it fully supports the proposition we now make. Thus, it appears thoroughly settled by authority that, under the circumstances, the district court retained its control over the proceedings, and granted a rehearing and entered a new decree, with the same effect as though the whole had occurred during the June term. *During that term the court had, of course, entire control over the decree entered on July 21st, and might at any time vacate it and enter a new decree.* It is of no consequence whether the petition was regarded by the district court as a petition for a rehearing or for a review, as the power of the court in this particular is regardless of forms, and may be exercised even in a summary manner. A striking illustration

of this is found in *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 Sup. Ct. 1113, 41 L. Ed. 211, where the court, after a mandate issued, recalled it and modified its judgment.

> "The district court therefore had power during the term at which the decree was entered to vacate it and enter a new decree, and retained this power over the case by permitting the filing of the petition for a rehearing, as we have already shown, so that the result is in all respects the same as though all the proceedings had occurred at the June term."

Again, in *In re Hudson Clothing Company*, 140 Fed. 50, the court says:

> "It is undoubtedly true also that the Court has a right to grant a rehearing for the purpose of allowing an appeal to be taken. This petition may fairly be held to present the question of a review."

In *In re Worcester County*, 102 Fed. 807, 42 C. C. A., 637, Judge Putnam, in speaking for the Circuit Court of Appeals, has said: "That it is of no consequence whether a petition is regarded by the court as a petition for rehearing or as a petition for review; that the court does not regard forms in this regard. In *In re Wright* (D. C.) 96 Fed. 820, Judge Lowell did grant a rehearing for the purpose of allowing an appeal to be taken."

Also in the case of *In re Ives*, 113 Fed. 912, the court discusses the question of jurisdiction as follows:

> "1. The trustee urges in this court that the remedy of the petitioners, if any, is by an ap-

peal from the order sustaining the demurrer, and that the 10 days provided for by appeal expired before the petition here was filed. Section 25 of the bankruptcy act of 1898 provides that appeals may be taken in bankruptcy proceedings to the circuit court of appeals from judgments adjudging or refusing to adjudge the defendant a bankrupt, granting or denying a discharge, and allowing or rejecting a debt or claim of $500 or over, and that such appeals shall be taken within 10 days after the judgments appealed from have been rendered. An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication is not referred to in this section, and is not a judgment from which an appeal will lie, within its purview. It rather comes within section 24, authorizing the Circuit Court of Appeals 'to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction,' which provides a summary mode of reviewing the orders of the bankruptcy courts upon questions of law on petitions filed in the appellate court by parties aggrieved. *Courier-Journal Job Printing Co. v. Schaffer-Meyer Brewing Co.*, 41 C. C. A. 614, 101 Fed. 699; *In re Seebold*, 45 C. C. A. 117, 105 Fed. 910; and the large number of cases in the note in *In re Eggert*, 43 C. C. A. 12-15.

"2. The petition shows that several terms of court intervened between the adjudication sought to be vacated and the filing of the petition, and it is urged that an adjudication in bankruptcy is under the control of the court only during the term at which it is made, and can be set aside or modified only during that term; that it, like all other judgments, passes beyond the power of the court when the term at which it was made closes, unless steps are taken during that term to vacate or correct it.

The Supreme Court of the United States has, in strong language, expressed this view in all cases coming within the principle of the cases it was considering when the expressions were made, and that view is not open to question. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013. But in section 2 the bankruptcy act seems to contemplate that from the filing of the petition to the closing of the estate the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered, and which have no terms. It provides that matters arising in a bankruptcy proceeding may be heard in vacation or term time, and orders allowing or disallowing claims may be reconsidered, closed estates reopened, and compositions and discharges set aside. It has been held by the Supreme Court that under the bankruptcy act of 1867 the district court, for all purposes of its bankrupcty jurisdiction, is always open, and has no separate terms; that the proceedings in a pending suit are, therefore, at all times open for reexamination upon application therefor in appropriate form, and that any order made in the progress of the case may be subsequently set aside and vacated upon proper showing, provided rights have not become vested under it which will be disturbed by its vacation; and it is held that application for such re-examination will not have the effect of a new suit, but of a proceeding in an old one. *Sandusky v. Bank*, 23 Wall, 289, 23 L. Ed. 155. This language used in reference to the bankruptcy act in *Re Lemon & Gale Co.* (C. C. A.) 112 Fed. 296. We are of the opinion, therefore, that the question presented by the petition was open, and the court below had power to determine it, although several terms of the district court had expired since the adjudication."

It is quite apparent, we believe, that the petition for rehearing or review as the case may be, in the instant case was filed with the best of good faith. If the actual records in the State Court did not sustain the recitals in the purported claim filed by the receiver Macomber, and since the recitals of said claim apparently were the controlling factor as to the conclusion reached by the District Judge, it was imperatively the duty of the trustee to call this state of affairs to the District Judge instead of appealing to this Court without so doing.

The District Court ruled against the contention of the trustee as to whether or not it was incumbent upon the clerk to furnish him a copy of order as contained in Equity Rule No. 4 of the Supreme Court. The case cited by counsel in his brief (In the matter of Stafford) is the only case so far as appellant has been able to ascertain in which this question was discussed. In passing, however, it will be noted that this was a district court decision and deals with a discharge in bankruptcy. The opinion of the court was rendered on September 1, 1915. No formal order of discharge was entered in pursuance of the opinion until a year afterwards, namely, September, 1916, when a *nunc pro tunc* order as of September 1, 1915, was entered. A petion to reopen the order was filed, the exact date of the filing of the petition not being given, but clearly more than a year after the opinion had been rendered. Such being the facts the petitioners were not in a position to appeal very strongly to the court.

ON THE MERITS.

There must be no misunderstanding on the facts: About eleven months after Peter Thompson was adjudicated a bankrupt, a certain creditor brought suit against a corporation in which Thompson was a stockholder and had a receiver appointed. Subsequently this receiver initiated a proceeding to collect on the stock subscription. Under the law of Washington, as has been sufficiently pointed out, it is a necessary prerequisite to establishing liability on a stock subscription, that a preliminary hearing be had, and in the event the Court is of the opinion that there is a basis warranting suit by the receiver, the latter is authorized to proceed accordingly. Opposing counsel states the rule on pages 40 and 41 of his brief. Appellee was not satisfied with getting the preliminary order but proceeded to procure from the trial judge a *decree*. This decree he now states is not subject to attack by the trustee in bankruptcy.

We have here not a judgment secured *prior* to bankruptcy, neither have we a judgment on a matter *initiated prior* to bankruptcy, and reduced to judgment after adjudication. It is a proceeding initiated in a state court *after* adjudication.

Sec. 62a (5) says under debts which may be proved: "founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt's discharge, *less costs incurred and interests accrued after the filing*

of the petition and up to the time of entry of such judgments." In the present claim there is included $1000.00 as "expenses of administration". (p. 5).

We seriously question whether the state court could acquire jurisdiction to liquidate a claim against a bankrupt estate, regardless of the question of appearance or process. Once a bankruptcy court assumes jurisdiction, it assumes it for all purposes, and the jurisdiction is exclusive.

> *Virginia, etc., Co. vs. Olcott*, 197 Fed. 730; Collier (11th Ed.) pp. 28 *et seq.*

The entire proceeding of the state court is a part of the record in this case, certified copies of the same being sent down. This record speaks for itself. The "process", the appearance (?) of the trustee are all set forth. The stipulation (?) which counsel now says amounts to a general appearance is in the record. A proposed stipulation can not become anything until signed by all parties. Counsel does not deny that he was unwilling to enter into a stipulation, and hence refused to sign the document mailed to him. Had he signed it, and thus made it an instrument entitled to be filed, his argument about "general appearance" might merit consideration.

His reference to the statute, on page 38 of his brief, is beside the question. It is a very common practice "to appear" in an action thereby to prevent

a default and until some appropriate pleading can be prepared. As we have said, it might be argued with some force, that actually entering into a stipulation constitutes a *general* appearance, but certainly a mere *proposal* to enter into such a stipulation cannot be so considered.

To be sure, opposing counsel must have had considerable doubt as to his procedure, or else he would not have resorted to the extremity of secretly filing the instrument with appellant's signature attached, and paying the filing fee on the same.

On page 26 of his brief, appellee italicizes the recital as to the "additional issues orally made up between the parties", etc. Counsel well knows that there were no "issues orally made up", and neither will he deny that he presented and had signed the purported "decree" without having submitted the same to Peter Thompson or the trustee, or to their attorney, and in their absence.

The certified record of those proceedings shows no service of the proposed Findings and Decree, and no notice of presentation as required under the rules. However, we do not wish to be understood that anything we have said is in the nature of a criticism of the state court. Courts naturally rely on counsel and assume that no fact is recited not entitled to be recited.

We have examined the authorities cited by appellee and find that they deal with three classes of

cases: (a) judgments procured before bankruptcy, (b) judgments procured after bankruptcy, but initiated *prior* thereto, (c) suits by trustees to set aside preferences or to recover specific property. None of them deals with judgments procured on proceedings initiated *after* bankruptcy.

Appellee refers to the several Washington cases. He has confused the word *must* with *should*. The fact that a court finds at a preliminary hearing that so much money is necessary to pay the debts of the insolvent corporation and *should* be paid by the several stockholders does not mean that these same stockholders *must* pay. They may have any number of defenses. The question of set-off, counter claim, fraud, want of consideration, etc., are all open to them when they are brought into court in a plenary suit. Why does the Supreme Court in *Chamberlain vs. Piercy*, *Beddow vs. Huston*, *Rea vs. Eslick*, all cited by appeellee, *say that the receiver shall bring suit? Why doesn't the court direct that a judgment shall be entered in the receivership proceedings as was done in this case?*

Suppose Peter Thompson was not in bankruptcy, could a binding judgment have been entered against him under the show cause order in the receivership matter? Could *any* judgment have been entered against him in the receivership case?

Matter of Berlin Dye Works & Laundry Co., 34 A. B. R. 452, is a well considered opinion collecting a number of cases. A judgment had been pro-

cured in the Superior Court of California against the defendant, *prior* to bankrupty of the defendant. An appeal was prosecuted from said judgment, resulting in an affirmance of the same. During the pendency of the appeal defendant was adjudged a bankrupt. The judgment was then filed in the bankruptcy proceedings and *disallowed*, because it was not absolutely owing at the time of filing petition in bankruptcy. The opinion says: *"It was not res adjudicata until it had become a final judgment* (p. 460). On the other hand, if a claim is reduced to judgment before the filing of the bankruptcy petition it may be proved *as a judgment though not, if not reduced to judgment until after the filing of the petition"* (our italics), citing *In re Crescent Lumber Co.*, 154 Fed. 724; 19 A. B. R. 112.

In brief a judgment procured after bankruptcy ensues cannot be *res adjudicata.*

We respectfully refer the Court to the *Berlin* case. While the opinion was written by the referee, it is well considered and ably presented.

See, also,

Cotting vs. Hopper, Lewis & Co., 34 A. B. R. 23.

Judge Lurton in the case of *In re Neff* (6th Cir.), 157 Fed. 57; 19 A. B. R. 23, says: "The status of a claim must depend upon its provability at the time the bankruptcy petition was filed. At that time it must come within the definition of sec. 63

of the Bankruptcy Act; *it cannot be benefited by its status at a later date*" (our italics).

In *In re Pettingell & Co.*, 137 Fed. 840; 14 A. B. R. 728 (D. C. Mass.), it is said, "The provability of a claim under the Bankruptcy Act of 1898 depends upon its status at the time the petition in bankruptcy is filed; if then provable within the definition of sec. 63 it may be proved; otherwise not." To the same effect see *Slocum vs. Soliday* (1st Cir.), 25 A. B. R. 460; 183 Fed. 410.

In the matter of *Berlin, etc., Co., supra*, the opinion, among other things, says in speaking of claims entitled to be proved:

> "To be absolutely owing it must be owing beyond peradventure, positively and unconditionally. No modified definition can be given to the expression in the statute of 'absolutely owing'. It is futile to argue that the claim is a liquidated claim by reason of judgment entered in the Superior Court of Los Angeles County. It could only be liquidated when that judgment became a final judgment. It is not such a claim as can be liquidated in bankruptcy. Clause 'b' of sec. 63 to the effect that 'unliquidated claims against a bankrupt may pursuant to application to the court be liquidated in such manner as it shall direct', does not enlarge the class of provable debts, but simply provides for reducing into form, in which they may be proved those debts which, if liquidated, could be proved, under clause 'a', as being either judgment debts, contract debts, taxes or costs. 1st Rem. on Bankruptcy, sec. 705, and cases cited."

We think that the above is necessarily the rule and not subject to dispute. If it were permitted that claimants might go into foreign jurisdictions, the state court of Washington in this instance, and there secure judgments on proceedings initiated after the Bankruptcy Court has assumed jurisdiction, and then set up these judgments as *res adjudicata*, the doors would be open for all sorts of fraud. For example, the bankrupt might confess judgment on a doubtful claim or might not put up a meritorious defense. He would be little interested in the outcome as long as his bankrupt estate would be called upon to respond, and indeed if it were a claim of such a nature that he would not be relieved of liability by reason of the bankruptcy proceedings he would be all the more anxious that claimant obtain a judgment, which under appellee's contention would preclude further investigation.

II.

Assuming the findings as set forth in the claim filed by the receiver are correct, the sole question presented concretely is this: Peter Thompson at the time of his incorporation owed a number of creditors including creditors now represented by the trustee, and also creditors who had furnished merchandise to his Seattle store. However, these creditors had no lien of any kind and the merchandise which Thompson then had in his Seattle store was his absolutely to do whatsoever he wished with. He concluded to turn it over to the corporation in pay-

ment of his stock subscription together with good-will, etc.

Our contention is that there is no such thing as Thompson's "equity" as counsel refers to. If these creditors had had a mortgage or some other form of security, then of course he could convey only his equity. The creditors in question had extended credit to Thompson as an individual and he owed them the balances of their respective accounts. We cannot see that the fact that the corporation may or may not have assumed Thompson's indebtedness alters the situation.

Certainly those creditors did not release Thompson, and it is an interesting query as to why these creditors did not file their claims direct in this proceeding.

We do not want to pursue the discussion in this matter to any length because of our belief that the other objections will dispose of the case. In passing, however, we heartily agree with the doctrine announced in *Lantz vs. Moeller*, 76 Wash. 429—in fact, the writer was the attorney for the respondent in that proceeding, and urged the adoption of the views as set forth in the court's opinion.

III AND IV.

Appellee bases his answer to objections III and IV on the fiindings made by the state court. He says, at the bottom of page 53, "The finding of the court below that claims aggregating $7500.00 constituted a true, just and valid indebtedness against

Peter Thompson, a corporation, precluded any further inquiry on that subject in the Bankruptcy Court."

What we have already said in discussing objection I is applicable here, and we will not repeat the same.

We gather from appellee's argument that there would be merit in the trustee's objections III and IV except for the fact that he is precluded from raising those objections on account of the finding and decree of the state court.

V AND VI.

We do not believe it is necessary to enter into a further discussion of objections V and VI. Appellee has brought forth no new cases, and we content ourselves with the discussion in our opening brief. We will cite, however, without comment, the following:

In re Pettingell, etc., Co., 14 A. B. R. 728;

In re Bingham, 2 A. B. R. 223;

In re Burka, 5 A. B. R. 12;

In re Swift, 7 A. B. R. 347.

It is respectfully submitted that the controversy herein involved is properly before this Court and that the decision of the District Court should be reversed and appellee denied participation in these funds.

W. W. KEYES,
Attorney for Appellant-Petitioner.